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United States Circuit Court of Appeals

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For the Ninth Circuit

FAIRBANKS, MORSE & COMPANY, a Corporation, Plaintiff in Error,

vs.

LEVI F. AUSTIN and JAY R. AUSTIN, Co-Partners Doing Business Under the Firm Name and Style of AUSTIN BROTHERS: HELEN S. AUSTIN; and NETTIE M. AUSTIN, as Trustee, Defendants in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION
HONORABLE FRANK H. RUDKIN, JUDGE

BRIEF OF DEFENDANTS IN ERROR

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STATEMENT OF THE CASE

Defendants in Error accept, in the main, the statement of the case made in the brief of Plaintiff in Error except as to the following facts:

That there was no modification whatever of the contract sued upon.

That any offers made by Plaintiff in Error, prior to the recission of the contract, to supply a substitute pump, was for a pump of much smaller, and inadequate, capacity than that contracted for, being a four-inch pump whereas that contracted for was an eight-inch pump. (Record, p. 82).

That the defendants in error, depending upon the fulfillment of the contract sued upon, removed the irrigating plant which they had formerly used and sold the same to the plaintiff in error, who gave them credit for the said old plant, in the sum of $200, on the contract for the new plant. (Record, p. 61). (Testimony of Levi F. Austin). (Record, p. 35). (Exhibit of Contract on which credit for old engine appears as $200).

The testimony of Levi F. Austin (Record, p. 61) was to the effect that from the substitute plant, installed by defendants in error to salvage as much as possible of their crop, after the breach of the contract by plaintiff in error, that the defendants in error were able to begin irrigating on the 20th of May and that it occupied four weeks thereafter to

get the water over their land and that they completed the first irrigation of the said land between the 20th of June and the 1st of July of the year 1920.

In that section of country it is necessary to begin irrigating as early as the first of April and the defendants in error did not begin (in 1920) until May 20th. (Record, p. 62). And that in pervious years because of the late date at which they obtained water from their old plant they lost much of their crop but that in 1919 they had sunk a new well, which furnished the water earlier, and in which they had intended to place the new machinery contracted from plaintiff in error. (Record, pp. 60, 61 and 62).

ARGUMENT AND AUTHORITIES

Plaintiff in error, in its brief, admits that the only question presented by the assignment of errors in this case "Is whether or not the defendants in error have made out a case entitling them to recover a judgment for special damages in addition to the general damages." (Brief, p. 31).

We understand that this admission includes the assignment of errors as to the amendment of the

complaint, which amendment, however, was entirely in the discretion of the trial court.

"The exercise of the power to permit amendments rests in the sound discretion of the trial court."

> 21 R. C. L., p. 127, citing a long line of decisions from the Supreme Court of the United States and other appellate courts.

On page 3 of the brief of plaintiff in error a paragraph of the contract in issue is printed in italics to the effect that the said proposal contains all agreements pertaining to the property therein specified, there being no verbal understanding whatsoever, and when signed by purchaser and approved by an executive officer or local manager of Fairbanks, Morse & Co., becomes a contract binding parties thereto.

No question as to that feature of the contract was raised in the trial court and we do not conceive that it has any legal relation to the issue here, but that it relates only to the primary transaction of purchase and sale of the machinery.

In any event the parole evidence rule does not preclude the reception of parole evidence with reference to a matter evidenced by the writing, where

such evidence relates to a matter **in pais**, or is of such a character that it does not tend to vary or contradict the written instrument.

17 Cyc., Par. 2, p. 638.

"It is a recognized rule of construction that the court will place itself in the position of the parties who made the contract, as nearly as can be done, by admitting evidence of the surrounding facts and circumstances, the nature of the subject matter, the relation of the parties to the contract, and the object sought to be accomplished by the contract. * * * Even though the contract is in writing, extrinsic evidence of the surrounding circumstances is admissible to aid the court to determine the intention of the parties."

Roller vs. George H. Leonard & Co., 229 Fed. at p. 618.

"How shall it be determined what the consequences were which the parties to a contract contemplated when they entered into the same? It has been decided that these consequences may be shown by oral evidence when the contract is in writing."

Stebbins vs. Selig, 257 Fed. 230. (Cited in brief of plaintiff in error at p. 44).

The contention of plaintiff in error is solely that the damages claimed and recovered by defendants in

error, and which we shall denominate as special damages, were not such as were within the contemplation of the parties at the time the contract was made, and are too remote and speculative to be considered, and that the trial court erred in submitting the question of such damages to the jury and should have granted the motion of plaintiff in error to take such question from the jury.

As to the question of the proximate cause of the injury, suffered by defendants in error, the trial court submitted that to the jury on the authority of the decision of the United States Supreme Court in **Milwaukee & St. Paul Railway vs. Kellog,** 94. U. S. 469, 24 L. Ed. 256, and cited that case and quoted from it in the Court's instruction to the jury.

In the last mentioned case the Supreme Court say:

"The assignment presents the oft embarrassing question, what is and what is not the proximate cause of an injury. The point propounded to the court assumed that it was a question of law in this case. * * * The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it."

Plaintiff in error in its brief, at page 33, says:

"The evidence in this case is susceptible of only **one reasonable inference** and therefore a question for the court under all of the authorities; that is, the evidence as to the special damages claimed by defendants in error in their first cause of action."

We maintain that the inferences to be deduced from the facts in evidence, in the instant case, were for the jury and that it was the right and duty of the Court to submit, as the Honorable Trial Judge did, all of the facts to the jury.

"The weight and sufficiency of the evidence are for the jury, and therefore if there is evidence in the case which fairly tends to support plaintiff's right to recover the court may properly refuse to take the case from the jury. * * * **The inferences to be deduced from the facts in evidence are for the jury, who are at liberty to draw such inferences as are reasonably deducible therefrom,** and it is error for the court to draw inferences of fact from the evidence, or to influence the jury to draw certain inferences therefrom."

38 Cyc., p. 1517 and authorities cited.

We understand the law, upon this point, to be that where there is a dispute about facts, where the credibility of witnesses is in issue, or where **it is doubtful**

what inference should be drawn from such facts as are proved, the matter is one for the consideration of the jury.

This view of the law is announced by the Supreme Court of Massachusetts in the case of **Litchfield v. Hutchinson,** (117 Mass. at p. 194) in which the court say:

"The only point argued by the defendants is, that it was erroneous in the presiding judge to decline to rule 'that it was solely a question of law for the court whether the relation of counsel and client or professional advisor existed between Edwards and Learned in such a manner as to disqualify said Edwards from acting as a magistrate,' and to submit this inquiry to the jury upon all the evidence. Where there is a dispute about facts, where the credibility of witnesses is in issue, or **where it is doubtful what inference should be drawn from such facts as are proved,** the matter is one for the consideration of a jury." Citing **Gavett v. Manchester Railroad,** 16 Gray, 501, 505, and cases cited.

Upon this point the Circuit Court of Appeals, Eighth Circuit, speaking by Judge Phillips, in the case of **First National Gold Mining Co., of New York and Colorado vs. Altvater, et al.,** 149 Fed. at p. 397, say:

"No right minded, self asserting judge, with a proper sense of duty, will permit a judgment, subject to his supervisory control, to be entered which his intelligent conviction advises him is unsustained by sufficient evidence. While abstaining from an undue assumption of the province of the jury to determine where the truth lies in conflicting evidence, **and the reasonable inferences to be drawn therefrom,** as said by Mr. Justice Brewer, in **Patton vs. Texas & Pacific Railway Company,** 179 U. S. 660, 21 Sup. Ct. 275, 45 L. Ed. 361: 'The judge is primarily responsible for the just outcome of the trial. * * * He has the same opportunity that jurors have for seeing the witnesses, for noting all those matters in a trial not capable of record, and when in his deliberate opinion there is no excuse for a verdict save in favor of one party, and he so rules by instructions to that effect, an appellate court will pay large respect to his judgment.' "

The Supreme Court of Wisconsin in the case of **Zentner vs. Oshkosh Gaslight Company,** 105 N. W. 911, announce the rule on this point as follows:

"It is well established that if there is any credible evidence in the case **from which a reasonable inference may be drawn** in support of the claim of either party to the action, then the court can not assume to decide the controversy as a matter of law. Under such circumstances the question of fact must be submitted to and determined by a jury." Citing other Wisconsin cases.

The Supreme Court of Indiana, in a case for damages for personal injury, entitled **Chicago & E. R. Co. vs. Thomas,** 55 N. E. 861, at p. 865 of the opinion say:

"In the last case cited, Judge Cooley says: 'If the circumstances are such that reasonable minds may draw different conclusions respecting the plaintiff's fault, he is entitled to go to the jury upon the facts.' "

The plaintiff in error, in its brief, at p. 34 thereof, also states that it, the plaintiff in error, "was justified in assuming that upon the hearing of the motion for judgment on the verdict of the jury the submission of the question of special damages would be considered the same as if the jury had not brought in its verdict at all, that is to say, the question would be decided by the court without any regard to the fact that the jury had brought in a finding holding the plaintiff in error liable for the special damages." But the law is held to be, "that the jury, in their deliberations on the facts, are as independent of the court as the judge, in determining the law, is of the jury; and the consequence is that when a case has been submitted to the jury, there it must remain until it has been decided by them, or is with-

drawn from their consideration, not at the will and pleasure of the court, but under circumstances justified by the law."

16 R. C. L., p. 184 and cases cited.

In the case of **Slocum vs. New York Life Insurance Co.**, p. 886, 57 L. Ed. (U. S.), 228 U. S. 361, the Court, speaking through Mr. Justice Van Devanter, say upon this point:

"Now according to the rules of the common law, the facts once tried by a jury are never re-examined, unless a new trial is granted in the discretion of the court before which the suit is depending, for good cause shown; or unless the judgment of such court is reversed by a superior tribunal, on a writ of error, and a **venire facias de novo** is awarded. This is the invariable usage settled by the decisions of ages. * * * The only modes known to the common law to re-examine such facts are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of the **venire facias de novo,** by an appellate court, for some error of law which intervened in the proceeding. * * * This requires that questions of fact in common law actions shall be settled by a jury, **and that the court shall not assume, directly or indirectly, to take from the jury or to itself such prerogative.** * * * It must therefore be taken as established * * * that when a trial by a jury

has been had in an action at law, in a court either of the United States or of a State, the facts there tried and decided can not be re-examined in any court of the United States, otherwise than according to the rules of the common law of England; that by the rules of that law, no other mode of re-examination is allowed than upon a new trial, either granted by the court in which the first trial was had or to which the record was returnable, or ordered by an appellate court for error in law; and therefore that, unless a new trial has been granted in one of those two ways, facts once tried by a jury can not be tried anew by a jury or otherwise, in any court of the United States."

And generally upon this point, as to the exceptions of plaintiff in error to the question of special damages being a matter for the consideration of the court only, and not for the jury, we quote from a very able opinion of Mr. Justice Sanborn, in the Circuit Court of Appeals for the Eighth Circuit, in the case entitled **Chicago G. W. Railway vs. Price,** 97 Fed. at pp. 427 and 428, as follows:

"The chief reliance of counsel for plaintiff in error is not upon their objections to the testimony. It is upon their contention that the court below should have instructed the jury to return a verdict in favor of the railway company. They insist that there were many questions presented by the evidence and

submitted to the jury which it was error for the court to refuse to decide, and that, if it had decided any one of them, the logical and unavoidable result would have been a peremptory instruction in favor of the company. The assignments of error which refer to this matter are numerous and voluminous. They assail various portions of the charge of the court, its refusal to grant numerous requests for instructions, and its failure to peremptorily instruct the jury in favor of the company. But when they are carefully analyzed, they all come to this: That for one reason or another the court erred because it did not direct a verdict for the railway company. Before entering upon a discussion of the questions which these assignments present, it is well to call to mind the established rules by which they must be determined. It is conceded that at the close of the evidence there is always a preliminary question for the Judge before the case can be properly submitted to the jury, and that is whether or not there is any substantial evidence upon which the jury can properly render a verdict in favor of the party who produced it, and that, if there is no such evidence, it is the duty of the court to direct the jury to return a verdict against him. But it is equally well settled that it is only when the evidence leaves the material facts admitted or undisputed, and only when these facts are such that reasonable men, in the exercise of an honest and impartial judgment can fairly draw but one conclusion from them, that the court may properly withdraw the case from the jury. If the evidence relative to the material facts is contradictory,

or if, reasonable men may well draw different conclusions, it is the duty of the court to submit the issues to the jury."

Citing numerous cases from the U. S. Supreme Court and U. S. Circuit Court of Appeals.

The United States Circuit Court of Appeals in the case of **Crookston Lumber Co. vs. Boutin,** 149 Fed. at p. 685, speaking through Adams, J., say:

"It is a well settled rule, recognized by the courts of the United States, that a question of law always arises at the close of the evidence in any case, whether there is any substantial proof warranting a verdict in favor of the plaintiff. In applying this rule, consideration most favorable to plaintiff must be given to all the evidence **and reasonable inferences arising therefrom;** the undisputed evidence must be so conclusive (1) that all reasonable men in the exercise of an honest and impartial judgment can draw but one conclusion from it and (2) that the court would in the exercise of sound judgment set aside a verdict returned in opposition to it."

Citing a large number of U. S. Supreme Court and U. S. Circuit Court of Appeals decisions.

In the case of **Morrison vs. The City of Madison,** 71 N. W. at p. 882, a case for damages for personal injury, the Supreme Court of Wisconsin say:

"If there was any room for honest differences of opinion among reasonable men of unbiased minds in respect to the inferences that should be drawn therefrom regarding the fact in issue, then it was for the jury, and not the court, **to draw the correct inference.** It is only when the facts are undisputed, and the **reasonable inferences therefrom** in regard to the ultimate fact in issue are all one way, that what is the proper inference is a question of law for the court to answer."

We submit that the facts in the case were properly submitted to the jury, by the Honorable Trial Court, and that the authorities cited, **supra,** amply sustain and justify his action in that regard and we desire at this point to particularly point out the case of **Globe Refining Company vs. Landa Cotton Oil Co.,** 190 U. S. 540, 47 L. Ed. 1171, which is particularly relied upon by plaintiff in error, but which we maintain supports our position on this branch of the case and in which the Supreme Court say:

"It must not be forgotten that we are dealing with pleadings, not evidence, and pleadings which, as we have said, evidently put the plaintiff's case as high as it possibly can be put. **There are no inferences to be drawn,** and therefore cases like **Hamond vs. Bussey,** L. R. 20 Q. B. Div. 79 do not apply. * * * **Whether if we were sitting as a jury, this would**

warrant an inference that the defendant assumed an additional liability, we need not consider."

Turning now to the main contention of plaintiff in error which is expressed in its brief at pp. 32 and 33 as follows:

"We respectfully submit that under the pleadings and the evidence in this case the defendants in error are not entitled to recover any special damages, because such special damages were not within the contemplation of the parties at the time the contract was made and are too remote and speculative to be considered."

We respectfully submit that, aside from the fact that that issue has been determined by a jury and that their verdict and the judgment thereon is not vulnerable to successful attack, and should be affirmed—for the reasons stated, the position of plaintiff in error upon the said proposition (that the damages were not in the contemplation of the parties at the inception of the contract) is not tenable in the instant case and that the authorities cited by it (plaintiff in error) to sustain that proposition are all distinguishable, in their facts, from the instant case and are not analogous, in the legal effect of the facts stated, in any of them, to the facts in the instant case.

In the cases cited by plaintiff in error, to sustain their contention in this regard, it will be found that in each case the special circumstances were held to be unknown to the party breaching the contract, before entering into it, whereas in the instant case we maintain that the special circumstances were fully disclosed and that adequate damages were in the contemplation of the parties, at the time of making the contract, in event of breach.

The plaintiff in error, at or before the time the contract was entered into, was informed of the purpose, for which the machinery was required and of the peculiar conditions under which it was intended to be used, and the time when its installation was necessary in order to irrigate, and thereby save, the crops of defendants in error, and the agent of plaintiff in error was, before said contract was entered into, taken over the land which it was intended the said machinery should be used to irrigate, and it was part of the contract, between buyer and seller, that the said machinery must be delivered at Haven Station, near the said premises of defendants in error, by December 31st, 1919, in order that it might be installed and ready to begin irrigating the land of defendants in error by April 1st, 1920, and

that it would be necessary to have said machinery delivered by that time, in order to save said crop of defendants in error, and the defendants in error were assured by the agent of plaintiff in error that there would be no question, and no failure on the part of the plaintiff in error in making timely delivery of said machinery as afterwards expressed in the contract sued upon. (Testimony of Levi F. Austin, Record, pp. 58 and 71).

It was understood that the irrigating of this land was to begin April 1st, 1920, and that the said machinery would be delivered three months prior to this time, which interim was to be used in installing the same, and relying upon this assurance, of plaintiff in error, defendants in error sold their old pumping plant to plaintiff in error at the time of the purchase of the new plant and the price, $200.00, was credited upon the contract for the new machinery, (Record, p. 61) and defendants in error thereby deprived themselves, as was well known to plaintiff in error, of all means of irrigating their said land, after the execution of the contract herein sued upon, except by means of the said new machinery contracted for with plaintiff in error.

The contract was entered into on the 25th day of September, 1919, and while it called for delivery by the 31st of December, 1919, the defendants in error did not rescind said contract until the 30th of March, 1920, thereby giving six months, to plaintiff in error, within which to furnish this machinery and during that time numerous letters were written by defendants in error to plaintiff in error, asking for information regarding the machinery and the shipment thereof, which was agreed to be delivered as aforesaid, **and their letters were never answered.** (Testimony of Levi F. Austin, Record p. 61).

Knowing that irrigation was to begin by the first of April, in order to properly irrigate the crops of defendants in error, plaintiff in error certainly knew that if irrigation was delayed until the latter part of June, in a dry, hot and arid country, there could be but one result, namely: That no crop could be raised on said land and that the roots of perennial crops growing thereon must be seriously injured by lack of water.

It is also to be noticed, from the testimony, that this corporation carried the class of machinery, contracted for in the contract in this case, in their reg-

ular stock in the State of Washington. (Testimony of C. R. Miller for defendants, Record pp. 79 to 81, and testimony of W. J. McIntosh for defendants, pp. 82 and 83).

As is said in **Boutin vs. Rubb,** 82 Fed. at p. 688.

"The circumstances demanded immediate and diligent action, not laggard performance nor shuffling effort to evade. All necessary facts were communicated to the appellants, which disclosed the emergency, and advised them of the need of immediate action."

And in **Missouri Pacific Railway Co. vs. Hall,** 66 Fed. at p. 869, the court, through Judge Thayer, say:

"The knowledge that a party has, when he enters into an agreement, of the object which the opposite party hopes to accomplish, should be allowed to have some weight in determining whether the party thus informed discharged the obligation she assumed with reasonlable diligence, and with due regard to the accomplishment of the purpose which the other party had in view." Citing other authority.

In support of our contention, on this branch of the case, as to what damages, in the language used by the U. S. District Court, in **Hunt vs. Oregon Railway Company,** 36 Fed. at p. 488: "May reasonably be supposed to be in the contemplation of the parties

at the time of making the contract, that is, such as might naturally be expected to follow its violation." And as expressed by the Supreme Court of the United States in **Globe Refining Co. vs. Landa Cotton Oil Co., infra:** "What liability the defendant may fairly be supposed to have assumed consciously, **or have warranted the plaintiff reasonably to suppose that it assumed, when the contract was made,"** and bearing in mind, as said in **Hunt vs. Oregon Pacific Railway Co., supra,** "Still it has been found impracticable to devise any definite and comprehensive rule applicable alike to the facts in all cases. Therefore in such case the measure of damages must to some extent depend on its own circumstances." We respectfully submit the following authorities:

As before stated, the plaintiff in error knew and the testimony discloses that the gasoline engine which furnished defendants in error all of the power for pumping, which they had used previous to the year 1920, had been taken apart, packed and sold by defendants in error to the plaintiff in error and credited by plaintiff in error on the contract for the new machinery, the subject of this action, as part of the purchase price thereof, and plaintiff in error knew that defendants in error had thereby deprived

themselves of any means for pumping water, for irrigation of their land, and relied therefor absolutely upon the fulfillment by plaintiff in error of their said contract.

A situation very analogous to that of the defendants in error, in the instant case, and in the respect just referred to, is disclosed in the case of **Central Trust Co. vs. Clark,** 92 Fed. at p. 297 (C. C. A. 8th Circuit), in which the court say:

"No notice to, or knowledge by, the Steel Company, at or before it made this contract, that this gear wheel and pinion (the subject of the action) **were ordered to replace old machinery,** or that the old machinery was badly worn or weak, or liable to break or to be insufficient to operate the railroad at its normal speed or that the income of the Cable Company was liable to be reduced $181.00 per day, or at all, by its failure to complete the contract on January 3rd, 1893, was either proved or offered to be proved."

The implication being, of course, in the opinion just quoted from, that if the fact of knowledge by defendant, of the defective nature of the old machinery, or that the new machinery was ordered to replace the old machinery which was imperfect, had been proved, that it would have furnished the ne-

cessary presumption of the contemplation by the parties of special damages in case of the breach of contract.

And in **McDonald vs. Kansas City B. & N. Co.,** 149 Fed. at p. 365, the Circuit Court of Appeals say:

"Proof of knowledge, by the defaulting party, at the time he makes the contract, of special circumstances which make damages, other than those implied by the contract and naturally flowing from it, the natural and probable effect of its breach, will warrant the recovery thereof."

And we desire to particularly call the attention of the court to the case of **"The Saigon Maru"** in the U. S. District Court of Oregon, decided the 16th of August, 1920, by Wolverton, J., and reported in volume 267 Fed. p. 881, where the legal principles here involved are exhaustively discussed. In this opinion Mr. Justice Wolverton quotes, with approbation, from the Oregon case of **Hockersmith vs. Hanley,** 44 Pac. Rep., at p. 500 as follows:

"The intention of the parties is to be ascertained from a consideration of the contract, taken in connection with the surrounding circumstances and conditions of which they are cognizant; and if the circumstances and conditions are such as to make it apparent that the contract was entered into and

known by the contracting parties to have been consummated to enable one of them to serve or accomplish a particular purpose, the liability of the other for its violation will be determined, and the damages ascertained with reference to the effect of the breach, in hindering or defeating the contemplated object."

The testimony, to which we have already referred the court, as disclosed in the Bill of Exceptions, establishes the fact that not only did the plaintiff in error have four months in excess of the time stipulated in the contract, for the delivery of the machinery, but that said plaintiff in error also neglected to answer several letters written to it as to the shipment and status of this machinery prior to the recission, by defendants in error, of said contract.

Upon this point, of negligence, the Circuit Court of Appeals, in **Missouri District Tel. Co. vs. Morris,** 243 Fed. 481, have held that:

"Where defendant has negligently failed to perform a service which he has contracted to perform, the circumstances may be such that he will not be permitted to assert that he did not know the purposes for which plaintiff desired such service."

We also respectfully submit that plaintiff in error, in the instant case, is estopped and will not

be permitted to assert that it did not know the purposes for which defendant in error desired the machinery in question for this reason, to-wit: That the copy of the contract annexed to the Answer of plaintiff in error, as shown on page 35 of the Record, shows that the old engine, which, previous to the execution of said contract, had furnished all power used for pumping water for irrigation of land of the defendant in error, had been sold to plaintiff in error and credited on the face of said contract (Record p. 35), as part of the purchase price of the new machinery and the testimony of the defendants in error disclose the facts that this old engine had been taken apart and packed ready for shipment and held by them subject to the plaintiff in error and that thereafter they had no machinery or facilities upon the premises for pumping water, all of which was well known to plaintiff in error and the Answer of plaintiff in error in the third paragraph of the Second Affirmative Defense thereof (Record p. 29), alleges:

"That on or about the 2nd day of April, 1920, the defendant offered to furnish said plaintiffs with a temporary unit, consisting of engine and pump, and on the 9th day of April, 1920, it confirmed in writ-

ing the said offer to plaintiffs, stating it could furnish the plaintiffs a 25 H.P. type Y Oil Engine, similar in every respect to the one purchased by them, which it had in stock in Seattle, together with a four inch pump that could handle about 550 gallons of water per minute, which it also had in stock in Seattle, to be used by plaintiffs as a temporary equipment until defendant could procure from another source, on thirty days' delivery, a new pump similar to the one purchased. * * * And that when the new pump arrived it could be substituted for the temporary pump installed. * * * That defendant again in writing on the 21st of April, 1920, submitted to plaintiffs the proposition to furnish engine and pump from Seattle which would amply meet plaintiffs needs until the permanent pump arrived, which offer was also refused by plaintiffs; that had said plaintiffs accepted the offers of defendant, to furnish it the temporary pump and equipment as aforesaid, no damage would have been sustained by them."

Now we maintain that the sale of the old engine to plaintiff in error, leaving defendants in error absolutely without any facilities, thereafter, for irrigating their said land, and the facts alleged in the answer of plaintiff in error just quoted, absolutely establish knowledge, by plaintiff in error, of the special conditions and circumstances affecting this contract, even though it stood alone and was not sustained and reinforced by the other special cir-

cumstances alleged in the pleadings and proven upon the trial, and hereinbefore referred to, and estopp plaintiffs in error from claiming that these conditions and circumstances were not in the contemplation of the parties at the time the contract was entered into.

This contention is sustained, we think, by the case of **District Telegraph Co. vs. Morris, (supra),** and also by the late case of **Sven Nelson vs. Davenport,** 108 Wash. 259, in which the Supreme Court of this State of Washington at p. 264 of the opinion say:

"Respondent claims appellant's whole case is at fault for the recovery of prospective profits because there was nothing in the testimony to show, or from which it can be inferred, that the consequences of which appellant complains were within the contemplation of the parties at the time the contract was made. Admit the rule of law to be as counsel contends, his attitude in attempting to apply it to this case overlooks the fact that, in the contract between the parties, which is set out in full in the complaint, there is a provision to the effect that appellant shall use care to discover and return any silver, dishes or wares that he may find in the cans, and in his answer there is a positive allegation of a breach of this provision in the contract, in that, from time to time during the life of the contract, appellant left respondent's silverware in the hog pens to be lost and

destroyed, retained it for his own use, or gave it away, and that such conduct came to the knowledge of respondent, who on several occasions warned appellant in regard thereto. **Under such circumstances respondent is not in a position to contend he was unaware of appellant's business and its dependence upon the material covered by the contract."**

As to the cases cited by plaintiff in error we submit that upon examination it will be found that none of them support the contentions of plaintiff in error, in the instant case, and bear no analogy thereto in the vital points, of knowledge of the special circumstances, that entered into the contract when the same was made.

In **Hadley vs. Baxendale,** 9 Ex. 341 (Law Journal Vol. 23 p. 182), which plaintiff in error describes as a classic in the law, Baron Alderson, in stating the facts in the opinion says:

"Now, in the present case, if we are to apply the principles above laid down, we find that the only circumstances here communicated by the plaintiff to the defendant at the time the contract was made were, that the article to be carried was a broken shaft of a mill, and that the plaintiff was the miller of that mill. But how do these circumstances reasonably show that the profits of the mill must be stop-

ped by an unreasonable delay in the delivery of the broken shaft by the carrier to the third person; suppose that the plaintiff had another shaft in its possession put up or putting up at the time, and that he only wished to send back the broken shaft to the engineer who made it, it is clear that this would be quite consistent with the above circumstances, and yet the unreasonable delay in delivery would have no effect upon the intermediate profits of the mill."

It is only sufficient to quote the above to refute any application of **Hadley vs. Baxendale,** as controlling, in the instant case.

In the case of **Pennypacker vs. Jones,** 106 Pa. 237, cited and relied upon by plaintiff in error, we find that the question of the contributory negligence of the defendant, who owned the mill and sued for damages, entered largely into the case and affected the result.

The Supreme Court of Pennsylvania, in the last mentioned case, state in the opinion as follows:

"He also found, however, that the delay of more than six days in starting the mill was not the fault of the defendant; that the cleaning and separating machinery was not to be, and was not, furnished by the defendants, but by the plaintiffs, and that the defect in the quality of flour produced was due in part to defects in the cleaning machinery, partly to

the defects in the bolting system, and partly to defects in the purifiers. * * * The general rule of law is that the remedy shall be commensurate with the injury sustained. A scrutiny of the American cases leaves every agreement of the kind pretty much at large to stand on its own peculiarities."

The case last quoted from was decided by the Supreme Court of Pennsylvania on a review of the judgment entered upon the decision of a referee.

The case of **Corvin vs. Thompson,** 39 Canadian Supreme Court, was one for damages for failure to repair an engine used in a mill for cutting lath wood and the points determined can be best understood from the following part of the opinion:

"If the trial judge had found under the peculiar cirmustances of this case the full sum he awarded, of $427.00, as damages for loss of the use of the mill, I should not have been disposed, in the light of the language used by Blackburn, J., in **Elbinger Actien-Gesellschafft, Etc. vs. Armstrong,** (1) at page 477, to quarrel with the finding as a reasonable compensation for the loss of the use of the mill. But I am not able to follow him when he finds $150.00 as such compensation, and then adds to it the actual expenses of wages and board of the men. The damages, whatever they were found to be, for the 'loss of the use of the mill' covered everything recoverable."

Stebbins vs. Selig, 257 Fed. 230, decided by the Circuit Court of Appeals for the Eighth Circuit, and largely relied upon, in the instant case, by plaintiff in error, in the facts bears no analogy to the instant case, although the learned counsel for plaintiff in error thinks otherwise. A vital and controlling point of difference is that the last mentioned case was decided upon demurrer to the complaint whereas the instant case was determined by the verdict of a jury and, as said by Mr. Justice Holmes in **Globe Refining Co. vs. Landa Cotton Oil Co.,** 190 U. S. 540, 47 L. Ed. at p. 1174: "It must not be forgotten that we are dealing with pleadings, not evidence, * * * **whether if we were sitting as a jury, this would warrant an inference that the defendant assumed an additional liability, we need not consider.** It is enough to say that it does not allege the conclusion of facts so definitely that it must be assumed to be true." It should also be noted that in the last mentioned case of **Stebbins vs. Selig,** a dissenting opinion was filed by Stone, J., of the Circuit Court of Appeals.

The contract sued upon, in **Stebbins vs. Selig,** contemplated the execution of a most uncertain physical undertaking, involving much manual labor and

unknown, undiscoverable, and speculative physical difficulties, within a very limited period of time (20 days), and was a case in which it would be unreasonable to believe that a contractor would, in the regular course of business, contemplate assuming the risk of such special damages as were therein claimed. The case at bar is, in its circumstances and conditions, very different, and it is a universally accepted maxim in the law of damages that each case must largely be determined by its own circumstances.

"Still it has been found impracticable to devise any definite and comprehensive rule applicable alike to the facts in all cases. Therefore in such case the measure of damages must to some extent depend on its own circumstances."

Hunt vs. Oregon-Pacific Railway Co., 36 Fed. p. 481.

The case of **Globe Refining Co. vs. Landa Cotton Oil Co.**, 190 U. S. 540, 47 L. Ed. 1171, is largely relied upon by plaintiff in error as authority, in support of its contention, in the instant case.

The said case was decided on demurrer to the complaint and the Supreme Court, in that case, emphasized, in the opinion, the fact that it was deter-

mined upon pleadings, and not upon evidence, and that such being the case there were no such inferences to be drawn as a jury would be entitled to draw from the evidence in the case had it been allowed to reach a jury. We have already quoted from the opinion of the Supreme Court in this latter case wherein they distinguish between determining the case on the pleadings and what their decision might be had a jury passed on the facts and inferences properly deducible therefrom. In this latter case the Supreme Court also say:

"If a contract is broken, the measure of damages generally is the same, whatever the cause of the breach. We have to consider, therefore, what the plaintiff would have been entitled to recover in that case, and that depends on what liability the defendant fairly may be supposed to have assumed consciously, **or have warranted the plaintiff reasonably to suppose that it assumed,** when the contract was made."

At pages 51 to 53 of the brief of plaintiff in error reference is made to testimony as to the time when water was put upon the land in previous years, but all such evidence was fully qualified in the oral testimony and the jury took it all into consideration in reaching their verdict. It is a matter of common

knowledge that it is the warm weather of May that causes the damage to un-irrigated crops in the arid country in question and Levi F. Austin in his testimony, Record, p. 61, says: "Our lands were partly irrigated in 1920. We were compelled to put in another outfit, one we picked up at a different place, pump one place and motor another place, and we started irrigating about the 20th of May. We got over our lands between the 20th day of June and the first of July. It took us about four weeks to go over the place."

This testimony, just quoted, refers to the crop of 1920, upon which the damage occurred which is the subject of this suit. It shows that it occupies about four weeks to get water over the entire area of a tract of land of from eighty to one hundred acres when irrigation is begun so late in the season and that beginning at that late date, the 20th of May, they were practically unable to save any of their crop.

In the case of **Howard vs. Stilwell & Bierce Mfg. Co.**, 139 U. S. 199, 35 L. Ed. 147, relied on by plaintiff in error, the Supreme Court, speaking through Mr. Justice Lemar, conclude the opinion thus:

"There was no stipulation in the contract that the defendants should make profits on flour from the wheat ground up by the machinery which the plaintiff contracted to furnish and erect in the mill. **Nor were there any special circumstances attending the transaction from which an understanding between the parties could be inferred** that the plaintiff was to make good any loss of profits incurred by a delay in furnishing and putting up such machinery, according to the terms of the contract."

The case of **Hart-Parr Co. vs. Barth Mfg. Co.,** also relied upon by plaintiff in error, is utterly inapplicable to the instant case, as the only reference to any claim for special damages is thus indefinitely referred to in the opinion:

"There was a similar condition of the testimony regarding the amounts which the Barth Company was entitled to recover on account of the work and material it furnished upon the right cylinder, especially upon the amount, character, and value of the materials furnished upon the right cylinder and upon the left cylinder, **which forbid judgment for the amounts allowed by the court without the verdict of a jury.** These conclusions compel a reversal of the judgment below and a new trial, and render it unnecessary to discuss other alleged errors."

In **Shelly vs. Eccles,** 283 Fed. 361, No. 2 Advance Sheets, dated November 30th, 1922, the Circuit

Court of Appeals, Eighth Circuit, quote with approval from **Howard vs. Stilwell & Birce Mfg. Co. supra,** as follows:

"But it is equally well settled that the profits which would have been realized had the contract been performed, and which have been prevented by its breach, are included in the damages to be recovered in every case where such profits are not open to the objection of uncertainty or remoteness, or where from the express or implied contract itself, or the special circumstances under which it is made, it may be reasonably presumed that they were within the intent and mutual understanding of both parties at the time it was entered into."

We have endeavored to cover, and we think we have covered, very fully the authorities cited by plaintiff in error in support of their contentions in the instant case and we submit to this Honorable Court that there is not a single one of the authorities cited, by plaintiff in error, that is applicable to the facts in this case or that supports their theory of the law in the case.

We further respectfully submit that the trial court did not err, in submitting all of the facts testified to in this case to the jury and that it was the right and duty of the trial court so to do and that

it was entirely within the province of the jury to infer the facts as to what damages were in contemplation of the parties to the contract in the event of breach.

We further submit that there was ample testimony as to the special circumstances in this case to warrant the jury in drawing the inferences which it did.

Before closing we wish briefly to refer to the statements of plaintiff in error, in its brief at page 32, as follows:

"If the plaintiff in error is in effect an insurer of profits which may be made by its customers, when, without negligence on its part it fails to make delivery of machinery at the time ordered, it, as well as other manufacturers will hesitate to contract to deliver machinery at a definite date, or if it does so will be obliged to charge an exorbitant price in order to reimburse itself for losses that it must suffer through the occasional breach of its contract to deliver. If such damages under such circumstances are allowed, the result to business will be disastrous. The enormous damages that might ensue in the breach of the smallest contract may be so augmented that one would not be safe in doing any kind of business."

These remarks, we submit, are inexact in this: That there probably are few cases in the books in-

volving analysis facts, that describe a greater degree of negligence than that indulged in by the plaintiff in error in the instant case, as the facts are indisputably proven that they had six months, before the rescission of the contract, within which to deliver machinery which they largely carried in stock within one hundred and fifty miles of the place where it was to be delivered, to-wit, in the City of Seattle, and even if it had to be brought from one of their more distant branch establishments, in another state, that the delay constituted gross negligence, and in the further fact that they failed and refused to answer the letters of defendant in error, during the said six months, inquiring as to the said machinery and its whereabouts and status and the time when it could be expected to be delivered.

As to the remaining remarks referred to at page 32, of the brief of the plaintiff in error, we regret to say that they appear to us to constitute a begging of the question.

For the reasons and under the authority cited, we respectfully submit to this Honorable Court that the decision of the trial court, in the instant case, should be affirmed.

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